

SUCCESSION LAW APPLICABLE IN ITALY AFTER REGULATION (EU) NO. 650/12

1. Regulation (EU) No. 650/12

a) Applicable law - Main Provisions

Effective Date

Regulation (EU) No. 650/12 of the European Parliament and of the Council of 12 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession became applicable in Italy on 17 August 2015.

Purpose and Scope of Application

The rules of this Regulation are conceived to favour the coincidence between the applicable law (*ius*) and the jurisdiction (*forum*), aiming at ensuring that the authority dealing with the succession applies, in most situations, its own law.
Article 23 provides that *"the law determined pursuant to the Regulation (see Article 21 or Article 22 of the Regulation, as specified below) shall govern the succession as a whole. That law shall govern in particular:*

a) *the causes, time and place of the opening of the succession;*
b) *the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination determination of other succession rights, including the succession rights of the surviving spouse or partner;*
c) *the capacity to inherit;*
d) *disinheritance and disqualification by conduct;*
e) *the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;*
f) *the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);*

g) *liability for the debts under the succession;*
h) *the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;*
i) *any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and*
j) *the sharing-out of the estate".*

General Criteria

a. Habitual Residence

As a consequence, since 17 August 2015, pursuant to the Regulation the general criterion to determine either the jurisdiction or the law applicable to the succession as a whole, shall be the law of the State in which the deceased has his habitual residence at the time of death (Article 21, first paragraph), while, before August 17, 2015, the general criterion was that of the nationality of the deceased.

It is not always easy to determine the habitual residence of a person.
In this respect, the Regulation tries to give some help, and in particular:

- *"In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation" (recital 23);*
- *nevertheless, In certain cases, determining the deceased's habitual residence may prove complex.*
  Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the center of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States,

his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances (recital 24)*;*

- *"Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under the main criteria as set forth herein above, the law applicable to the succession shall be the law of that other State"* (Article 21, second paragraph)*;*
- *in this respect, "With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex"* (recital 25)*.*

b. Choice of the Applicable Law

By way of derogation from the criterion set forth above, Article 22 of the Regulation allows a person to choose, as the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death, providing in such a case that:

(i) a person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death;
(ii) the choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition;
(iii) the substantive validity of the act whereby the choice of law was made shall be governed by the chosen law;
(iv) any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

b) European Certificate of Succession

As a further novelty, the Regulation introduces the European Certificate of Succession (Article 62), which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

The use of the Certificate shall not be mandatory. The Certificate shall not take the place of internal documents used for similar purposes in the Member States.
However, once issued for use in another Member State, the Certificate shall produce its effects in all Member States, without any special procedure being required.
The Certificate shall be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements.

The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.

Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on succession property to a person mentioned in the Certificate as being entitled to accept such payment or succession property shall be considered to have transacted with a person entitled to accept such payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

Where a person mentioned in the Certificate as being entitled to dispose of succession property disposes of such succession property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person entitled to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.
The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State.
In Italy the Certificate shall be issued by a notary or by a court.

2) Succession *mortis causa* in Italy

Where the Italian succession law has to apply to a deceased, the following main principles have to be considered. During his life, the deceased could have disposed of its assets with a will (the will can be holographic – drawn up without a notary – or public or secret – drawn up before a notary).
The will takes effect after the death of the testator.
Pursuant to Article 588 of the Italian Civil Code (ICC) *"the testamentary provisions, whatever may be the expression or denomination used by the testator, are by universal title and attribute the status of heir, if they include the totality or a share of the property of the testator; other dispositions are by particular title and attribute the status of legatee".*
In the absence of a will the succession shall be ruled by operation of law (ex lege), and therefore by the ICC.
Article 457 of the ICC establishes the principle of the prevalence of the testamentary succession over the principle of the rule of law according to which the law provisions have residual value and only apply in the absence of a valid will draw up by the deceased, or in the presence of a valid will that, nevertheless, does not provide for the entire estate.

Reserved shares

In case of testamentary succession, the principle of testamentary freedom applies except for one limitation: the rights to the reserved shares in favour of the so-called forced heirs (*legittimari*) must be respected.

The Italian Civil Code identifies the forced heirs in the deceased's surviving spouse, children/lineal descendants, and, if there are no children, in the ascendants (it is specified that the divorced spouse loses all succession rights at the time of the divorce judgment).

The verification of observance of the right to the reserved shares and the exact quantification of the available shares can only be carried out at the time of opening of the succession of the deceased; on the date of opening of the succession, the value of the whole estate is determined, by means of an accounting operation (a theoretical summation, socalled *riunione fittizia*) which sums the value of the assets part of the succession (*relictum*), after deducting the hereditary debts, to the value of the assets donated during the life of the deceased (*donatum*) (and revalued at the time when the succession is opened).

Any heirs who believe that their share has been impaired may bring an action of reduction within ten years of the opening of the succession, asking the Judicial Authority to issue a constitutive judgement to declare the total or partial ineffectiveness of the testamentary dispositions and donations (also indirect) that exceed the amount available to the testator.

Agreements as to Succession

Some problems may arise in Italy due to the application of the Regulation on agreements as to succession.

In Italy, they are divided into agreements "establishing a right" (so-called *istitutivi*), disposition agreements (*dispositivi*), and waiver agreements (*rinunciativi*). They have the following common requisites: (i) the existence of a non-testamentary legal transaction and (ii) the object of the transaction concerns a future succession.

Under the Italian succession law, before the opening of the succession, no agreement between the heirs regarding the succession is permitted: in fact, pursuant to Article 458 of the ICC *"Any agreement by which one disposes of his own succession is void. Any act by which one disposes of the rights that can belong to him by a succession not yet opened, or renounces the same, is equally void"*.

This provision is linked to that referred to in Article 457 of the ICC, according to which the devolution of succession can only take place by law or by will.

This kind of instruments are defined under Article 3 of the Regulation as agreements *"including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement".*

The Regulation (Article 25) provides that:

- an agreement as to succession

  - *"regarding the succession of one person, shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded";*
  - *regarding the succession of several persons, shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded;*
  - *which is admissible pursuant to the previous paragraph "shall be governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those with which it has the closest connection";*

- *notwithstanding what is provided for above, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons, whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.*

That said, the application of these rules actually obliges the Member States that prohibit agreements as to succession – as is the case of Italy – to acknowledge them, if the conditions above are met.
Therefore, for example, an agreement as to succession signed by a German citizen who has his habitual residence in Germany, remains valid even if he subsequently transfers his habitual residence to Italy and his succession opens there.

Thus, an heir who renounces his reserved share pursuant to a valid agreement as to succession (under the applicable law at the time of renunciation according to the provisions of Article 25 of the Regulation), cannot subsequently enforce his reserved share even though the said renunciation is considered null and void under the applicable succession law of the country to which he subsequently transfers his habitual residence.

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Please do not hesitate to contact us for any further clarification.
Nicola Canessa